Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

HORN'S POULTRY, INC.,

Petitioner,

v.

NORWEST TRANSPORTATION, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a motor common carrier's reliance upon a tariff which does not bear its name violates this Court's decision in *Security Services, Inc. v. Kmart* and the filed rate doctrine?

PARTIES TO THE PROCEEDING

The parties to this proceeding are those identified in the caption of the case - Horn's Poultry, Inc. and Norwest Trans, Inc.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE FILED RATE DOCTRINE AND THE SUPREME COURT'S RECENT DECISION IN SECURITY SERVICES v. KMART 6

II. THE COURT SHOULD EXTEND DEFERENCE TO THE ICC'S INTERPRETATION AND APPLICATION OF 49 C.F.R. § 1312.20 18

CONCLUSION 20

Appendix A 1a

Appendix B 9a

Appendix C 16a

Appendix D 22a

TABLE OF AUTHORITIES

Page

CASES

Appeal of Rejection of Adoption Publications – BGR Transportation Co., Inc., No. 40942, 1993 Fed. Carr. Cas. (CCH) ¶ 38,056 (May 17, 1993), *appeal pending*, D.C. Cir. No. 93-1363 18

Carrier Traffic Service, Inc., v. Toastmaster, Inc., 707 F.Supp. 1498 (N.D. Ill. 1988) 13

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 19

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) 7

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 7

National Railroad Passenger Corp. v. Boston & Maine Corp., ___ U.S. ___, 112 S. Ct. 1394 (1992) 19

Northwest Trans v. John Morrell & Co., Civil Action No. C-93-4032, 1994 Fed. Carr. Cas. (CCH) ¶ 83,941 (N.D. Ia Oct. 19, 1994) 10, 13

Security Services, Inc. v. Kmart Corporation, ___ U.S. ___, 114 S. Ct. 1702 (1994) ..... *passim*

United States v. De Coursey, 82 F. 302 (N.D.N.Y. 1897) 17

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1337 5

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2101(c) 2

49 U.S.C. § 10101 6

49 U.S.C. § 10741(b) 7

49 U.S.C. § 10761(a) 2, 6, 7, 12

49 U.S.C. § 10762(a)(1) 2, 3, 6, 7, 8, 9, 10, 12

49 U.S.C. § 10762(b)(1) 2, 4, 9

49 U.S.C. § 10922(b)(1) 2, 6

49 U.S.C. § 10926 ..... 2, 9

49 U.S.C. § 10927(a)(1) 2, 6

49 U.S.C. § 11902 7

49 U.S.C. § 11904 7

REGULATIONS

49 C.F.R. § 1312.20 ..... 2, 4, 9, 18, 19

49 C.F.R. § 1312.20(a)(2) 9, 12

49 C.F.R. § 1312.20(b) 9

49 C.F.R. § 1312.20(b)(1) 9

49 C.F.R. § 1312.20(b)(1)(i) 4, 12

49 C.F.R. § 1312.20(b)(2) 9, 12

49 C.F.R. § 1312.30(c) 9

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PETITION FOR A WRIT OF CERTIORARI

Horn's Poultry, Inc. hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of United States District Court for the Central District of Illinois is unreported and is reprinted as Appendix B (App. 9a-15a). The opinion of the Seventh Circuit Court of Appeals is reported at 23 F.3d 1151 and is

reprinted as Appendix A (App. 1a-8a). The Seventh Circuit's decision denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* is reported at 37 F.3d 1237 and is reprinted as Appendix C (App. 16a-21a).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1994. A petition for rehearing was denied on October 12, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761(a), 10762(a)(1), 10762(b)(1), 10922(b)(1), 10926, 10927(a)(1) and the pertinent regulations of the Interstate Commerce Commission, 49 C.F.R. § 1312.20, are set forth in Appendix D (App. 22a-26a).

STATEMENT OF THE CASE

This case is the latest involving enforcement of the "filed rate doctrine." In this case a motor common carrier is seeking to collect freight undercharges based upon tariffs that are published in the name of another carrier. While at first glance this case may appear to be one of first impression, it is merely a sequel to this Court's

decision in *Security Services, Inc. v. Kmart Corporation*, ___ U.S. ___, 114 S. Ct. 1702 (1994).

Respondent's predecessor, **B.J. Xpress, Inc.** ("B.J. Xpress"), was a motor carrier incorporated under the laws of the State of Iowa on March 11, 1982. B.J. Xpress applied to the Interstate Commerce Commission ("ICC" or "Commission") for a certificate of public convenience and necessity as a motor common carrier. This application was granted by the ICC and a certificate was issued under docket number MC-162490 Sub 3, service date December 20, 1983.[1]

As a duly authorized common carrier, B.J. Xpress' operations were subject to and governed by title 49 of the United States Code and the Code of Federal Regulations promulgated by the ICC. In accordance with title 49 of the U.S. Code, B.J. Xpress duly published and filed tariffs with the ICC.[2] B.J. Xpress' tariffs were identified by the alpha code **"BJEI."** The publishing carrier of these tariffs was plainly identified as **"B.J. XPRESS, INC."**

The Respondent, **Norwest Trans, Inc.** ("Norwest"), a new and separate legal entity, was incorporated under the laws of the State of Iowa on January 30, 1987.

On July 27, 1987, **B.J. Xpress** filed a request with the ICC to have the Commission's records changed to reflect a "name change" to "**Norwest Trans, Inc.,**" and thereby transfer its operating authority to **Norwest**. The ICC,

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[1] B.J. Xpress, Inc. had been granted a Permit to engage in transportation as a contract carrier by motor vehicle in January, 1983.

[2] 49 U.S.C. § 10762(a)(1) (App. 22a).

by decision and order served August 13, 1987, granted **B.J. Xpress'** request conditioned on **Norwest's** taking the following action (emphasis added):

> If it has not already done so, **the carrier must amend** (1) its insurance coverage for the protection of the public, (2) its designation of agents upon whom process may be served, and (3) **its tariffs or schedules to reflect the new name**.

Independent of the Commission's order, the ICC's regulations at 49 C.F.R. § 1312.20 set forth the procedure a carrier must follow when it wishes to change its name, when its operating authority is transferred to another carrier or when a fiduciary assumes control of the carrier.[3] Under the Commission's regulations, Norwest was required to publish and file an adoption notice and a tariff supplement in order to use B.J. Xpress' tariffs as its own.[4]

Norwest failed to comply with the Commission's order of August 13, 1987 and the regulations at 49 C.F.R. § 1312.20, in that **Norwest** never adopted the tariffs of its transferor - **B.J. Xpress**, nor did **Norwest** ever file any new tariffs under its own name.

Between September 1989 and August 1990, **Norwest** transported 15 shipments on behalf of Horn's Poultry, Inc. ("Horn's"). **Norwest** billed Horn's $31,863.99 in freight charges for these shipments. Horn's paid the freight charges in full.

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[3] 49 C.F.R. §§ 1312.20(b)(1) (App. 25a-26a).

[4] *Cf.* 49 U.S.C. § 10762(b)(1) (App. 23a).

Some time after the shipments moved and after the freight bills were paid, **Norwest** conducted an audit of its freight bills. **Norwest** determined that according to the allegedly applicable tariffs Horn's had been undercharged in the amount of $8,242.81. **Norwest**'s claims for alleged "undercharges" are all based upon the application of the rates and charges found in a tariff identified as **ICC BJEI 203**, which was published and filed by **B.J. Xpress, Inc.** Upon Horn's' refusal to pay the claims for undercharges, **Norwest** commenced an action against Horn's in the United States District Court for the Central District of Illinois.[5]

Norwest moved the district court for summary judgment claiming its entitlement to the undercharges under the "filed rate doctrine." Horn's cross-moved for summary judgment on the grounds that the tariff sought to be applied by Norwest - ICC BJEI 203 - was inapplicable to Norwest due to Norwest's failure to adopt same.

On July 29, 1993, the district court granted summary judgment in favor of Norwest. On May 3, 1994, the court of appeals affirmed the district court's opinion. On October 12, 1994, the court of appeals denied Horn's petition for rehearing with a suggestion for rehearing *en banc.*

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[5] Original jurisdiction in the district court was founded upon 28 U.S.C. §§ 1331 and 1337.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE FILED RATE DOCTRINE AND THE SUPREME COURT'S RECENT DECISION IN SECURITY SERVICES v. KMART

The decision of the court of appeals, allowing Norwest to utilize the tariffs published by B.J. Xpress without filing an adoption notice or a tariff supplement, is inconsistent with the filed rate doctrine. It is also plainly at odds with this Court's decision in *Security Services, Inc. v. Kmart Corporation*, ___ U.S. ___, 114 S. Ct. 1702 (1994) (*"Kmart"*).

The Interstate Commerce Act ("ICA"), 49 U.S.C. § 10101, *et. seq*, confers upon the ICC the power to issue a certificate of public convenience and necessity to a motor common carrier authorizing the carrier to operate in interstate commerce. 49 U.S.C. § 10922(b)(1). Along with the issuance of a certificate of public convenience and necessity certain duties are created - both for the ICC and the motor carrier.

For example, the ICC has a duty to ensure that duly authorized motor carriers maintain adequate insurance. 49 U.S.C. § 10927(a)(1). In addition, a duly authorized motor common carrier has a duty to "publish and file with the commission tariffs containing the rates for transportation it may provide," 49 U.S.C. § 10762(a)(1); and has a concomitant duty to charge and collect only those rates that are so published, 49 U.S.C. § 10761(a).[6]

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[6] There is no provision in the Interstate Commerce Act requiring the ICC to ensure motor carrier compliance with 49

The tariff scheme mandated by the ICA was aimed at preventing rate discrimination among shippers and carriers by allowing for the public inspection of tariffs, *see* 49 U.S.C. § 10741(b). Collectively, these statutory requirements have come to be known as the "filed rate doctrine." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

The concept of constructive notice is the linchpin of the "filed rate doctrine." It is well established that shippers and carriers are presumed to know, by virtue of constructive notice, the applicable tariff rates that are on file at the ICC. *Maislin, supra*; *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915). In fact, actual notice of the contents of a tariff is irrelevant under this doctrine. As this Court recently observed in *Kmart, supra*:

> [T]he likelihood or unlikelihood of a shipper's actually reading all the applicable tariffs is simply irrelevant, for carriers and shippers alike are charged with constructive notice of tariff filings, *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 653 (1913); *Reiter v. Cooper*, 507 U. S., at ___ (slip op., at 7), and the fact that shippers may take shortcuts through the filings cannot convert an incomplete tariff into a complete one.

___ U.S. at ___, 114 S. Ct. at 1710.

U.S.C. §§ 10762(a)(1) and 10761(a). Rather, compliance is fostered by the threat of civil and criminal sanctions which may result if a carrier or shipper deviates from the filed rate. *See* 49 U.S.C. §§ 11902-11904; *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

An inherent and indispensable element of constructive notice is for tariffs to be published in the carrier's name. This element is so fundamental it would be superfluous for § 10762(a)(1) (which mandates the publication of tariffs) to actually state that a carrier is required to publish a tariff in its own name. Without the publisher's name, a reader of the tariff cannot identify the rates applicable to shipments handled by such carrier, and the central purpose of the filed rate doctrine would be defeated. Indeed, any inquiry as to whether a tariff is applicable to a shipment must begin with the identity of the publisher of the tariff, namely the carrier.

In *Kmart*, the Court had occasion to address the significance of a carrier's identity in a tariff. In *Kmart*, Security Services, a successor to a common carrier (Riss), brought suit to recover undercharges from a shipper (Kmart) based on a tariff filed and published in Riss' name. The tariff relied upon in support of the undercharge claim set forth rates on a per mile basis. As a means of calculating the applicable mileage, Riss' tariff incorporated by reference an agent's tariff - the Household Goods Carriers' Bureau (HGB) mileage tariff. Riss, however, was not listed as a participant to the HGB's mileage tariff. Since Riss' name did not appear in the agent's tariff, Riss had no uniform method of calculating mileage published in its name. Because Riss had no mileage tariff published in its name, the Court held that Riss' rate tariff was incomplete and thus incapable of supporting the undercharge claim. The Court explained that the mileage tariff could only by utilized by Riss if that tariff was published in Riss' name. ___ U.S. at ___, 114 S. Ct. at 1706-1707.

In the case at bar, the ICC issued a certificate of public convenience and necessity to **B.J. Xpress**. Subsequently, **B.J. Xpress**, with the ICC's approval, transferred its operating authority to **Norwest**. When a motor carrier transfers its operating authority to another, it must do so in accordance with the regulations of the ICC. 49 U.S.C. § 10926 (App. 24a). The ICC's regulations governing the transfer of operations are found at 49 C.F.R. § 1312.20 (App. 25a-26a).[7]

As a common carrier, it was incumbent upon Norwest to publish tariffs applicable to its transportation services, 49U.S.C. § 10762(a)(1), in the form and manner prescribed bythe ICC, 49 U.S.C. § 10762(b)(1). Where the carrier is the recipient of another's authority, as in this case, § 1312.20(b) gives the transferee (*i.e.*, Norwest) the option of using thetariffs published by the transferor (*i.e.*, B.J. Xpress).[8] If the transferee elects this option, it must publish and file an adoption notice and a tariff supplement. 49 C.F.R. § 1312.20(b).[9] Norwest neither

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[7] Section 1312.20 provides that "[w]hen a carrier's name is lawfully changed or its operating authority transferred, tariff adjustments ***must*** be made." 49 C.F.R. § 1312.20(a)(2) (App. 25a) (emphasis added). This section further mandates that "[a]doption notices ***shall*** be filed to reflect new ownership or control," § 1312.20(b)(1) (App. 25a) (emphasis added), and that "[i]n addition to the adoption notice, an adoption supplement ***shall*** be filed to reflect the new carrier's adoption of the old carrier's tariff(s)," § 1312.20(b)(2) (App. 26a) (emphasis added).

[8] Compare 49 C.F.R. § 1312.30(c) with 49 C.F.R. § 1312.20. The former regulation, which was at issue in *Kmart*, permitted a carrier to utilize one of three methods in which to publish distances. The latter regulation, which is at issue here, permits a carrier an alternative to publishing its own tariffs.

[9] In addition to the tariff regulations, the Commission, through its order of August 13, 1987, conditioned its approval of

published its own tariffs, nor did it file the required adoption notice and tariff supplement. In short, Norwest had no tariffs published in its name.

Norwest's attempted use of B.J. Xpress' tariffs is akin to Riss' attempted participation in the HGB's mileage tariff in *Kmart*. Here Norwest was required to publicly announce its "participation" in B.J. Xpress' tariffs by filing an adoption notice and tariff supplement, whereas, in *Kmart*, Riss' participation in the HGB's tariff could only be established through a tariff filing by the HGB, as agent for Riss. Since Norwest did not make the requisite filings, Norwest abrogated its duty, under 49 U.S.C. § 10762(a)(1), to publish tariffs. Therefore, the tariffs filed by B.J. Xpress were inapplicable to services rendered by Norwest. *See Northwest Trans v. John Morrell & Co.*, Civil Action No. C-93-4032, 1994 Fed. Carr. Cas. (CCH) ¶ 83,941 (N.D. Ia Oct. 19, 1994), where an Iowa district court held:

> Because Norwest did not comply with these requirements to adopt its predecessor's tariffs, the court concludes that Norwest did not have a valid, filed, or published tariff. Because it had no valid tariff to apply to any shipment, it follows that Norwest had no tariff applicable to the shipments in question here.

Id., 1994 Fed. Carr. Cas. at p. 58,515.

Nevertheless, the Court of Appeals viewed Norwest's failure to adopt the tariffs of B.J. Xpress as merely a technical defect. The court held that it was the ICC's failure to initiate a proceeding to revoke B.J. Xpress'

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the name change on Norwest's filing the proper tariff adjustments.

tariffs which made B.J. Xpress' tariffs applicable to services rendered by Norwest.

> There is no convincing reason why a deviation from the filed rate should be sanctioned simply because Norwest failed to comply with the Commission's order to amend its tariff to show its new name. Under the statutory scheme of the Interstate Commerce Act, it is within the discretion of the Commission to determine whether to seek suspension or revocation of the tariff because of the carrier's failure to comply with the Commission's order to amend it to show the new name. 49 U.S.C. sec. 11701(a) ("the Commission shall take appropriate action to compel compliance with [the Interstate Commerce Act]"); see also 49 U.S.C. sec. 10925(b) ("the Commission may suspend, amend or revoke any part of a certificate, permit, or license . . . for willful failure to comply with . . . a regulation or order of the Commission"); *accord I.C.C. v. Am. Trucking Ass'n*, 467 U.S. 354, 365 (1984) (discussing that the Commission has discretion to take actions that are legitimate, reasonable, and directly adjunct to the Commission's explicit statutory power). . . .
>
> The Commission's noninstitution of any administrative proceedings against Norwest because of the latter's failure to amend its tariff to show its new name, left the previously filed tariff outstanding and effective, and Norwest could not deviate from the rates there set forth. The Commission's nonaction did not justify Horn's refusal to pay the full tariff amount.
>
> . . . "[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must

> exist some corollary punitive sanction for departures or omissions, even if negligent." [*United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990)]

23 F.3d at 1153-1154 (App. 5a-6a).

In its decision denying rehearing, the Court of Appeals again pointed to the Commission's failure to institute an administrative proceeding against the carrier as the cause for upholding the applicability of tariff BJEI 203. 37 F.3d at 1239 (App. 19a). The court below also attempted to distinguish *Kmart* on the grounds that 49 C.F.R. §§ 1312.20(a)(2), (b)(1)(i), (b)(2) do not contain a "voiding" provision.

> Unlike the regulation involved in *Kmart*, however, these regulations do not make the previously filed tariffs void for failure to amend them to reflect the changed name.

Id. (App. 20a).

The focus on the ICC's inaction and the absence of a voiding regulation by the court below is misplaced. This case is not about enforcement of an order from the Commission. Nor is it about enforcement of a regulation. This case is about enforcement of the filed rate doctrine, *i.e.*, 49 U.S.C. §§ 10761(a) and 10762(a), and Norwest's failure to abide by this doctrine's most fundamental precept - to publish tariffs in its name.

Under § 10762(a)(1) the motor carrier, not the ICC, has a duty to publish tariffs in its name. Under § 10761(a) the motor carrier, not the ICC, has a duty to charge only those rates it has duly published in its name. Where a motor carrier subsequently seeks to enforce its tariffs in

an action to recover freight undercharges, the carrier has the burden of proving the validity of its tariff. *John Morrell, supra,* 1994 Fed. Carr. Cas. at 58,514; *Carrier Traffic Service, Inc. v. Toastmaster, Inc.,* 707 F. Supp. 1498, 1505 (N.D. Ill. 1988).

The opinion below makes much of the fact that the ICC took no action to set aside the tariffs filed by B.J. Xpress. That the ICC initiated proceedings against Norwest for failure to maintain insurance and not to amend its tariffs is a red herring. As stated above, the ICC has a duty to ensure that motor carriers maintain adequate insurance, and to revoke a carrier's operating authority if it permits its insurance to lapse. In contrast, the ICC has no duty to ensure that the carrier complies with its obligations to properly publish and file tariffs. If no tariff is filed, a carrier simply has no lawful rates.

Reviewing insurance coverage is one of the few remaining oversight functions of the ICC. This function has remained intact largely due to the strong public policy concerns surrounding the maintenance of insurance. Indeed, the Commission's order in this case directs Norwest to amend "its insurance coverage **for the protection of the public,**" (emphasis added).[10]

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[10] In order to protect the public, the maintenance of insurance is obviously of greater import than the publishing of tariffs. While a carrier's failure to publish tariffs may leave some shippers open to *potential* discrimination (for which there are remedies), a carrier's failure to maintain insurance would undoubtedly leave the travelling and shipping public exposed to unrecoverable losses.

Apparently, the court below labored under a misconception that a tariff, regardless of who publishes it, must be blindly followed unless there exists a voiding mechanism or the ICC takes some action to set it aside. This simply is not the case. **Tariffs can be invalidated by their own terms without "any agency action at all."** *Kmart*, ___ U.S. at ___, 114 S. Ct. at 1709 (emphasis added).

One obvious way in which a tariff can be invalidated by its own terms is where the publisher of the tariff (*e.g.*, B.J. Xpress) transfers its operating authority to another entity (*e.g.*, to Norwest) but the transferee does not reflect the transfer in the tariffs. In this situation, the transferor's tariff is invalid as to the transferee carrier.

The court below also misapprehended the effect of finding Norwest's tariff incapable of supporting a claim for undercharges. The court observed that:

> If Horn's is correct that Norwest itself had no tariff on file that covered the services rendered to Horn's because the tariff was in the name of B.J. Xpress, then the lower-than-tariff rates Norwest charged Horn's were themselves illegal, and Norwest had no right to make or retain any charge for the service provided.

23 F.3d at 1154 (App. 7a). Apparently, the court believed that without a tariff the shipments would be governed by neither the agreed-upon rates nor the purported tariff rates, and Norwest would be obligated to reimburse Horn's for freight charges already paid.

The issue is not whether the "lower-than-tariff" rates agreed upon by Norwest and Horn's were illegal. Nor is the issue whether Norwest had a right to make or has a right to retain any charge for the service provided. The

question is whether Norwest can enforce another carrier's tariff to collect rates in excess of the agreed-upon rates already billed and paid. Clearly, in this case, the filed rate doctrine and *Kmart* prohibit such a result.

Justice Souter, writing for the Majority, stated:

> Petitioner argues that the effect of the void-for-nonparticipation rule is to allow transactions to be governed by secretly negotiated rates, rather than the publicly filed rates mandated by the Act. Petitioner would thus have us see the ICC's recent enforcement of its void-for-nonparticipation regulation as merely an attempt to evade *Maislin* and undermine the filed rate doctrine by keeping trustees or debtors-in-possession from recovering for undercharges.
>
> The argument is an odd one. The filed rate requirement mandates that carriers charge the rates filed in a tariff. We held in *Maislin, supra,* that the requirement was not subject to discretionary enforcement when raised against a shipper who had agreed with a carrier to a negotiated rate lower than the rate on file. When the carrier's bankruptcy prompted second thoughts about the wisdom of the agreement, the carrier and its creditors obtained the benefit of the requirement. Here, as in *Jasper Wyman, supra,* the carrier seeks to escape its burden by recovering for undercharges even though in effect it had no rates on file because its tariff lacked an essential element. **The filed-rate rule applied here to bar the carrier's recovery is the same rule that was applied to bar the shipper's defense.** Nor is the rule somehow more technical or less equitable when applied against Security Services. It can hardly be gainsaid that a

> carrier employing distance rates without purporting to be bound by stated distances would be just as well placed to discriminate among shippers by measuring with rubber instruments as it would be by charging shippers for a stated distance at mutable rates per mile. While some may debate in other forums about the wisdom of the filed rate doctrine, **it is enough to say here that the carriers cannot have it both ways.**

___ U.S. at ___, 114 S. Ct. at 1707-1708 (emphasis added).

In the instant case, Norwest "cannot have it both ways." It was Norwest's failure to properly adopt B.J. Xpress' tariff BJEI 203 which rendered this tariff inapplicable to services provided by Norwest. As such, Norwest cannot now hold Horn's to the rates in a tariff which did not apply to Norwest.

It was not incumbent upon Horn's to investigate the history of Norwest's tariff filings, or lack thereof. "[T]he likelihood or unlikelihood of" Horn's "actually reading all the applicable tariffs is simply irrelevant," *Kmart*, ___ U.S. at ___, 114 S. Ct. at 1710, because Norwest, like Riss in *Kmart*, is bound by the filed rate doctrine. If the tariff relied upon by the carrier is not properly published in its name, the carrier cannot rely upon that tariff to support a claim for undercharges. Thus, the filed rate doctrine which serves as the basis for Norwest's theory of recovery is the same doctrine which proves to be the undoing of its case.

Before turning to the next section, Petitioner would point out that, even without the Commission's regulations, Norwest would be barred from claiming B.J. Xpress' tariff as its own without first adopting it under a

simpler analysis. Norwest and B.J. Xpress were separate and distinct corporate entities. As such, Norwest cannot benefit from the actions undertaken by its transferor, B.J. Xpress, without ratifying or adopting the actions of its transferor. This has been the law for almost one hundred years! *See United States v. De Coursey*, 82 F. 302 (N.D.N.Y. 1897).

In *De Coursey*, the court found that the representative of a carrier in receivership could not be held civilly or criminally liable for giving a rebate off of the tariffs published by the carrier.

> The statute makes it unlawful for any carrier who is a "party to any joint tariff" to charge, etc. The defendant is not a party to the joint tariff in question for it was established before he was appointed receiver. There is no allegation that he subsequently became a party to the tariff or that he ratified, adopted or recognized it in any way. . . . The precise question here presented is believed to be novel, but the general proposition that a receiver is not bound to continue a contract entered into before his appointment and that he acts, not as the agent of the insolvent corporation, but as an independent carrier, is established by abundant authority.

82 F. at 303-304 (citations omitted). Like the receiver in *De Coursey*, Norwest never adopted or ratified the tariffs of B.J. Xpress.

Under traditional principles of corporation law the ratification of actions taken by a predecessor corporate entity has significant ramifications. Similarly, in the realm of interstate commerce, announcing the adoption of another carrier's tariffs by publishing it in tariff form is

the ***only*** means of ensuring the sanctity of the filed rate doctrine. In this case, Norwest's failure to publish, in tariff form, its adoption of B.J. Xpress' tariffs, left all shippers using Norwest, including Horn's, at a loss as to where to find the tariff rates applicable to Norwest's services. A shipper can only be on notice of those tariffs that are filed in the name of the carrier it uses. In this case there are no tariffs filed in Norwest's name.

II. THE COURT SHOULD EXTEND DEFERENCE TO THE ICC'S INTERPRETATION AND APPLICATION OF 49 C.F.R. § 1312.20

The ICC recently had occasion to address the identical issue which is before this Court in the case of *Appeal of Rejection of Adoption Publications – BGR Transportation Co., Inc.*, No. 40942, 1993 Fed. Carr. Cas. (CCH) ¶ 38,056 (May 17, 1993), *appeal pending*, D.C. Cir. No. 93-1363. In that case, Bobby G. Reeves, doing business as "BGR Transportation Company," incorporated his trucking company under the name "BGR Transportation Co., Inc." and filed a request for a name change with the ICC. The new corporate entity, however, failed to file adoption publications or new tariffs in its own name, as ordered by the ICC as a condition for its approval of the name change.

Subsequently, the corporation went bankrupt and the trustee, on behalf of the corporation, began dunning former customers for "undercharge" claims. It was brought to the attention of the trustee's attorney that the debtor corporation had no valid tariffs on file with the ICC. The trustee then attempted to file an adoption notice and adoption supplement to cure this defect *nunc pro tunc* -

some 59 months after the name change. The ICC rejected the attempted filing and an appeal to the D.C. Circuit Court of Appeals ensued.

In its decision, the Commission upheld the rejection of the adoption publications based on its tariff filing regulations as set forth in 49 C.F.R. § 1312.20. As the ICC observed:

> The Commission's regulations at 49 CFR 1312.20 are designed to facilitate a carriers' compliance with tariff filing responsibilities in situations where the carrier undergoes an organizational change including a change in name. If the "new" carrier elects to provide future transportation under the rates and terms of the "old" carrier's tariff(s), it may do so by filing appropriate adoption publications with the Commission; **the tariffs of the old carrier do not transfer automatically**. As an alternative, the new carrier can elect to file new tariffs in its own (new) name. When the new carrier chooses the first of these options it is incumbent on the new carrier to timely advise the public and the Commission (through publications filed with the Commission) of its adoption of the old carrier's tariff(s). Otherwise, the question may arise (as it now has) what rates, if any, are on file with the Commission and legally applicable for service provided by the new carrier.

Id. at 47,132 (emphasis added).

The ICC's decision in the *BGR* case is an interpretation and application of the same regulations at issue herein. As such, the Commission's opinion is entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-42 (1984); *National*

Railroad Passenger Corp. v. Boston & Maine Corp., ___ U.S. ___, 112 S. Ct. 1394, 1400-01 (1992). This Court noted, in *Kmart*, recently, that the ICC's "interpretation of its own regulations is entitled to 'controlling weight unless it is plainly erroneous or inconsistent with the regulation,' *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)." *Kmart*, ___ U.S. at ___, 114 S. Ct. at 1706, n. 2.

CONCLUSION

For the foregoing reasons, the Petition of Horn's Poultry, Inc. should be granted and a Writ of Certiorari issued to the Court of Appeals for the Seventh Circuit.

Dated: January 10, 1995

Respectfully submitted,

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APPENDIX A

NORWEST TRANSPORTATION, INC., Plaintiff-Appellee,

v.

HORN'S POULTRY, INC., Defendant-Appellant.

No. 93-3035.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 10, 1993.

Decided May 3, 1994.

Motor carrier brought action against shipper to collect difference between amount mistakenly charged shipper and higher rate specified in filed tariff. The United States District Court for the Central District of Illinois, Harold Albert Baker, J., held that carrier was entitled to recover underpayments, and shipper appealed. The Court of Appeals, Friedman, Circuit Judge, sitting by designation, held that carrier's failure to amend its tariff to show its new name, and Interstate Commerce Commission's nonaction to compel such amendment, did not preclude carrier from collecting from shipper amount specified in tariff.

Affirmed.

Lawrence M. Liebman, Timothy F. Eddy, Eddy & Liebman, Chicago, IL, Marc A. Zellen (argued), Miller & Zellen, Bloomington, MN, for plaintiff-appellee.

David C. Nelson (argued), Dilsaver, Nelson, Winter & Black, Mattoon, IL, for defendant-appellant.

Before CUMMINGS, FRIEDMAN* and CUDAHY, Circuit Judges.

FRIEDMAN, Circuit Judge.

The Interstate Commerce Commission (Commission) approved a motor carrier's request to change its name, and directed the carrier to amend its tariffs to show its new name. The carrier failed to do so. The question is whether such failure barred the carrier from collecting from a shipper the difference between the amount mistakenly charged the shipper and the higher rates specified in its filed tariff. The district court held that the carrier was entitled to recover the underpayments. We affirm.

I

In August 1987, the Commission approved the change of the name of B.J. Xpress to Norwest Trans., Inc. (Norwest). The Commission order approving the name change told the carrier that it "must amend . . . (3) its tariffs of schedules to reflect the new name." The carrier did not do so.

The order also told the carrier that it must amend "(1) its insurance coverage for the protection of the public." The district court stated: "Between August, 1987 and November 1990, the ICC commenced four separate revocation of authority proceedings against Norwest for

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*Daniel M. Friedman, Circuit Judge for the Federal Circuit, sitting by designation.

its failure to file evidence of insurance. Norwest submitted the requisite evidence of insurance and each proceeding was discontinued. No other ICC proceedings were begun against the carrier."

Between September 1989 and August 1990, Norwest carried 15 shipments for the appellant, Horn's Poultry, Inc. (Horn's), for which Norwest billed Horn's and Horn's paid $31,863.99. This was $8,242 less than the rates in the filed tariffs.

During a subsequent audit, Norwest discovered the underpayments. When Horn's refused to pay the deficiency, Norwest filed suit against Horn's in the United States District Court for the Central District of Illinois.

On cross-motions for summary judgment, the court held that Norwest could recover $8,242.81. The court stated that the issue was "whether a filed tariff is valid where the motor carrier has failed to amend the name on the tariff after a change in ownership, but the ICC has not taken any action to suspend or revoke the tariff." The court held that "[u]nless and until suspended or set aside by the Commission, the tariff is the legal rate between the shipper and carrier for all purposes, . . . since Norwest/BJ Xpress' tariff had not been suspended or set aside by the ICC, it was the legal rate which Horn's is obligated to pay."

II

A. Under the "filed rate" doctrine, a carrier cannot deviate from the tariff it has filed with the Commission. *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97,

35 S.Ct. 494, 495, 59 L.Ed. 853 (1915). *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417, 106 S.Ct. 1922, 1927, 90 L.Ed.2d 413 (1986); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 119, 110 S.Ct. 2759, 2762, 111 L.Ed.2d 94 (1990). Almost 80 years ago, the Supreme Court stated in *Louisville:*

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.

237 U.S. at 97, 35 S.Ct. at 495.

In *Square D,* decided after the Motor Carrier Act of 1980, which "substantially deregulated the motor carrier industry in many ways" (*Maislin,* 497 U.S. at 133, 110 S.Ct. at 2769), the Court quoted the following statement from *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163, 43 S.Ct. 47, 49, 67 L.Ed. 183 (1922):

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be barred or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress – prevention of unjust discrimination – might be defeated.

476 U.S. at 416-17, 106 S.Ct. at 1926-27.

In the present case, it is undisputed that the rate Norwest charged Horn's, and Horn's paid, was significantly less than the rate in the tariff that Norwest's predecessor had filed. It also is undisputed that that rate had not been superseded or set aside. Although that tariff had been filed by B.J. Xpress and not by Norwest, the latter was merely the new name under which the former carrier operated after the Commission had authorized the name change. Norwest, therefore, was entitled to recover from Horn's the amount necessary to bring the charges into conformity with the tariff on file with the Commission.

There is no convincing reason why a deviation from the filed rate should be sanctioned simply because Norwest failed to comply with the Commission's order to amend its tariff to show its new name. Under the statutory scheme of the Interstate Commerce Act, it is within the discretion of the Commission to determine whether to seek suspension or revocation of the tariff because of the carrier's failure to comply with the Commission's order to amend it to show the new name. 49 U.S.C. § 11701(a) ("the Commission shall take appropriate action to compel compliance with [the Interstate Commerce Act]"); *see also* 49 U.S.C. § 10925(b) ("the Commission may suspend, amend or revoke any part of a certificate, permit, or license . . . for willful failure to comply with . . . a regulation or order of the Commission"); *accord I.C.C. v. Am. Trucking Ass'n*, 467 U.S. 354, 365, 104 S.Ct. 2458, 2464, 81 L.Ed.2d 282 (1984) (discussing that the Commission has discretion to take actions that are legitimate, reasonable, and directly adjunct to the Commission's explicit statutory power). Indeed, such administrative action was the course the Commission followed when Norwest

failed to amend its insurance coverage to reflect its new name. The Commission instituted four separate proceedings to revoke Norwest's operating authority for this deficiency, which it dismissed after Norwest submitted the requisite evidence of insurance.

The Commission's non-institution of any administrative proceedings against Norwest because of the latter's failure to amend its tariff to show its new name, left the previously filed tariff outstanding and effective, and Norwest could not deviate from the rate there set forth. The Commission's non-action did not justify Horn's refusal to pay the full tariff amount.

In *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the Supreme Court held that a government forfeiture action filed within the applicable limitations period but not in compliance with other statutory timing requirements, was not subject to dismissal on the latter ground. The Court stated that it had held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanctions." *Id.* at ___, 114 S.Ct. at 506. The Court quoted the statement in *United States v. Montalvo-Murillo*, 495 U.S. 711, 717, 110 S.Ct. 2072, 2077, 109 L.Ed.2d 720 (1990), that "[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." *Id.*

Similar reasoning supports the conclusion that in the present case, Norwest's failure to amend its tariff to show

its new name, as the Commission ordered, and the Commission's non-action to compel such amendment, did not preclude Norwest from collecting from Horn's the amount specified in the tariff.

Indeed, Horn's argument proves too much. If Horn's is correct that Norwest itself had no tariff on file that covered the services rendered to Horn's because the tariff was in the name of B.J. Xpress, then the lower-than-tariff rates Norwest charged Horn's were themselves illegal, and Norwest had no right to make or retain any charge for the service it provided. Horn's, however, makes no such argument.

B. Horn's argues that, in any event, summary judgment against it was improper because there was a disputed issue of material fact: whether the filed tariff rates "were readily ascertainable or discernible" by it. The argument apparently is that because the filed tariff was in the name of B.J. Xpress, Horn's could not readily have ascertained the tariff of Norwest when Horn's entered into the transportation arrangements with that carrier.

Horn's however, makes no contention that it ever attempted but failed to ascertain the tariff that covered the shipments. In connection with this case, the Commission informed Horn's representative in response to an inquiry, that B.J. Xpress "changed its name" to Norwest, and referred to the B.J. Xpress-filed-tariff that covered the charges. If Horn's had wanted to identify the applicable tariff, it easily could have done so by making inquiry of the Commission or, perhaps, of Norwest itself. *Accord Coenco, Inc. v. Coenco Sales, Inc.*, 940 F.2d 1176, 1179 (8th Cir.1991) (discussing that simple observation or reverse

engineering sufficed to find item "readily ascertainable" in trade secret context).

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

NORWEST TRANS. INC., Plaintiff,	)	
vs.	)	No. 92-2270
HORN'S POULTRY, INC., Defendant.	)	(Filed Jul. 29, 1993)

ORDER

This matter is before the court on cross-motions for summary judgment (docket #9, 13). The plaintiff, a motor carrier licensed by the Interstate Commerce Commission (ICC), has sued Horn's Poultry for undercharges for transportation services under the Interstate Commerce Act, 49 U.S.C. §10761. At this time, the court grants summary judgment in favor of the plaintiff.

Background

The following facts are not contested: on August 10, 1987, the ICC amended its records to reflect the name change from BJ Xpress, Inc. to its successor in interest, Norwest Trans, Inc. *See* Letter from ICC, Aug. 10, 1987, attached to Plaintiff's Opposition to Motion to Dismiss (docket #8). The ICC directed Norwest to "amend . . . its tariffs of schedules to reflect the new name." *Id.* Norwest did not amend the name on the tariff. The tariff authority it used and presented on its invoices to Horn's was "ICC BJEI 203, item 2000, p 19." Between August, 1987 and

November 1990, the ICC commenced four separate revocation of authority proceedings against Norwest for its failure to file evidence of insurance. Norwest submitted the requisite evidence of insurance and each proceeding was discontinued. No other ICC proceedings were begun against the carrier. The defendant has not gone before the ICC to seek nullification or rejection of the plaintiff's tariff. Norwest discovered during an audit while it was winding down its business that Horn's had been billed and paid $31,863.99 for 15 shipments between September, 1989 and August, 1990. The charges according to the filed tariff rate should have been $40,106.80. Norwest here seeks $9,346.53, $8,242.81 for the difference between the billed rate and tariff rate, plus pre-judgment interest.

The defendant claims it is not obliged to pay the undercharges because the plaintiff violated 49 C.F.R. §1314.14(b) (1992).[1] The defendant reasons it should not have to pay the undercharges because if it had tried to research the carrier charges for Norwest, it might not have been able to discern the rate.

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[1] This regulation provides,

> When a carrier's name is lawfully changed, or operating authority is transferred to another carrier, or a fiduciary assumes possession and control of a carrier's property, all affected tariffs must be amended to reflect the changes. Regardless of the date the tariff is actually filed, the effective date for a name change amendment is the date the name change occurs. The effective date in all other instances is the date of consummation, or the date set by the Commission or a court.

49 C.F.R. §1314.14(b)

The plaintiff argues that failure to amend the tariff is a minor technicality that does not nullify the entire tariff or relieve the defendant/shipper from its obligation to pay the tariff rate. Norwest claims the case law and the statute mandate that the shipper pay the tariff rate until the ICC sets the tariff aside or suspends it. Since its tariff has not been set aside, Norwest argues Horn's is obligated to pay the undercharges.[2]

Analysis

A motor common carrier must file its published rates in a tariff with the Interstates Commerce Commission. 49 U.S.C. §10762; *Maislin Indust., U.S. v. Primary Steel, Inc.*, ___ U.S. ___, 110 S.Ct. 2759, 2765 (1990). The carrier "may

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[2] Additionally, the plaintiff claims there is no penalty indicated for noncompliance with 49 C.F.R. §1314.14(b) and therefore its failure to comply with the regulation is nonactionable. The ICC regulations plainly refute this [sic] assertions. The penalty for failure to comply with ICC tariff regulations in §1314.14 appears to be that the Commission may reject or strike the tariff. 49 C.F.R. §1314.2(a) (1992) ("These provisions govern the . . . maintenance of any tariff filed under the Act. . . . Tariffs that fail to meet the provisions of this part [1314] . . . may be rejected or stricken by the Commission.")

A more pertinent issue not raised by either party is whether part 1314 applies to motor carriers. The court's research discovered that the regulation upon which Horn's defense relies, 49 C.F.R. §1314.14(b), relates to electronic filing of tariffs. The Commission stayed its enforcement prior to its adoption. 54 Fed. Reg. 10,533 (Mar. 13, 1989). Thereafter, the Commission lifted the stay only as to rail carriers. 54 Fed. Reg. 42,959 (Oct. 19, 1989). It appears there has not been a global lifting of the stay. Thus, it is questionable whether the regulation is in effect as to motor carriers.

not charge or receive a different compensation . . . than the rate specified in the tariff. . . . " 49 U.S.C. §10761. The Supreme Court has interpreted the statute to require strict filed rate compliance, *Maislin*, 110 S.Ct. at 2766, and to require the shipper to pay the filed rate, regardless of whether the carrier quotes a lower rate. *Texas & Pac. Ry. Co. v. Dryden*, 202 U.S. 242, 245 (1906). "The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress – prevention of unjust discrimination – might be defeated." *Maislin*, 110 S.Ct. at 2766 (citations omitted).

Equitable defenses do not defeat collection of filed rates. *Id.; Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619, 621 (7th Cir. 1979) (fraudulent misquotation of tariffs does not relieve shipper from paying the filed rate); *Consolidated Freightways Corp. of Del. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980) (same); *Sea-Land Service, Inc. v. Sherman*, 528 F. Supp. 223, 224 (W.D. Wa. 1981) (defense of accord and satisfaction does not defeat filed rate requirement). Likewise, violation of an administrative regulation does not provide a carrier with an affirmative defense to the carrier's charges where the agency has not intimated that a carrier's violation precludes its recovery of the lawful freight charges. *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982); *see, e.g., Genstar Chemical Ltd. v. Interstate Commerce Commission*, 665 F.2d 1304, 1308-09 (D.C. Cir. 1981), *cert. denied sub nom, Nitrochem, Inc. v. Interstate Commerce Commission*, 456 U.S. 905 (1982) (plaintiff/carrier's non-compliance with 30-day notice regulation does not defeat claim for undercharges).

The issue in this case is whether a filed tariff is valid where the motor carrier has failed to amend the name on the tariff after a change in ownership, but the ICC has not taken any action to suspend or revoke the tariff. "When an administrative agency historically has engaged in comprehensive regulation of an industry's . . . practices, the agency's silence regarding an affirmative defense based on a violation of those regulations must be deemed significant." *Southern Pacific,* 456 U.S. at 345. Even if the ICC regulation advanced by Horn's does apply to Norwest, *see* n.2 *supra,* the penalty for failure to meet the requirements of part 1314 is that the ICC may reject or strike the tariff. 49 C.F.R. §1314.2(a) (1992). The ICC has not taken any action to suspend or revoke Norwest's tariff. Unless and until suspended or set aside by the Commission, the tariff rate is the legal rate between the shipper and carrier for all purposes. *Maislin,* 110 S.Ct. at 2765 (citations omitted). The court concludes that since Norwest/BJ Xpress' tariff had not been suspended or set aside by the ICC, it was the legal rate which Horn's is obligated to pay.

The plaintiff requests pre-judgment interest on the undercharges from the dates the services were rendered. In general, pre-judgment interest is not considered a penalty, but a form of compensation to the plaintiff for the loss of interest that the money would have earned. *Myron v. Chicoine,* 678 F.2d 727, 733 (7th Cir. 1982) (citation omitted). Whether to award pre-judgment interest is an equitable decision that lies within the discretion of the district court. *Michaels v. Michaels,* 767 F.2d 1185, 1204 (7th Cir. 1985), *cert. denied,* 474 U.S. 1057 (1986). Where a delay in payment is occasioned by a legitimate dispute, and is

not vexatious or unreasonable, denial of pre-judgment interest is not an abuse of discretion. *In re Burlington Northern, Inc.*, 810 F.2d 601, 609 (7th Cir. 1986), *cert. denied sub nom, Sprenger, Olsen & Shutes, P.C. v. Burlington Northern R. Co.*, 484 U.S. 821 (1987).

The Interstate Commerce Act and regulations do not specify whether a carrier is entitled to pre-judgment interest. The court has not found a Seventh Circuit case addressing this issue. Other circuits that have considered the issue have allowed pre-judgment interest from the date of shipment on undercharge claims. *Consolidated Rail Corp. v. Certainteed Corp.*, 835 F.2d 474, 478-79 (3d Cir. 1987); *Southern Pac. Transp. Co. v. San Antonio, Texas*, 748 F.2d 266, 274 (5th Cir. 1984); *Fawley Motor Lines v. Cavalier Poultry Corp.*, 235 F.2d 416 (4th Cir. 1956); *T. & M. Transp. Co. v. S.W. Shattuck Chem. Co.*, 158 F.2d 909 (10th Cir. 1947). The rationale behind these decisions is to treat shippers uniformly and compensate the plaintiff for the loss of the use of its money. *Consolidated Rail*, 835 F.2d at 478-79 (quoting *Southern Pac. Co. v. Miller Abattoir Co.*, 454 F.2d 357, 362 (3d Cir. 1972)).

The plaintiff has not pointed the court to any binding precedent that mandates an award of pre-judgment interest. The court concludes pre-judgment interest is not warranted in this case. Although the court as rejected Horn's argument, the defendant's challenge to the plaintiff's claim for undercharges was not vexatious or unreasonable. There are no countervailing equitable considerations making denial of the award unfair to Norwest. Accordingly, the request for pre-judgment interest is denied.

Conclusion

IT IS THEREFORE ORDERED that the plaintiff's motion for summary judgment (docket #9) is allowed in part and denied in part. The plaintiff is awarded $8,242.81 in undercharges. Pre-judgment interest is denied. The defendant's motion for summary judgment (docket #13) is denied. The clerk is directed to enter judgment in favor of the plaintiff and against the defendant in the amount of $8,242.81 together with costs of suit. Case terminated.

Entered this 29th day of July, 1993.

/s/ Harold A. Baker
HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-3035

NORWEST TANSPORTATION, INC.,

Plaintiff-appellee,

v.

HORN'S POULTRY, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 92 C 2270 – **Harold A. Baker,** *Judge.*

ON PETITION FOR REHEARING – DECIDED OCTOBER 12, 1994

Before CUMMINGS, FRIEDMAN* and CUDAHY,
Circuit Judges.

FRIEDMAN, *Circuit Judge.* In our decision of May 3, 1994, 23 F.3d 1151, we held that a motor carrier's failure to amend its tariffs to show its changed name, as the Interstate Commerce Commission (Commission) had directed it to do, did not bar the carrier from collecting from a shipper the differences between the amount mistakenly charged the shipper and the higher rate specified

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* Daniel M. Friedman, Circuit Judge for the Federal Circuit, sitting by designation.

in the filed tariff. We ruled that the Commission's non-institution of any administrative proceedings against the carrier to correct the carrier's default left the tariffs in effect, and that under the "filed rate" doctrine the carrier could not deviate from the rates in those tariffs.

The shipper – the appellant Horn's Poultry, Inc. (Horn's) – has filed a petition for rehearing contending, among other things, that our decision "conflicts with the filed rate doctrine, as most recently interpreted" by the Supreme Court in *Security Services, Inc. v. Kmart Corporation*, 114 S. Ct. 1702 (May 16, 1994). We do not interpret *Kmart* as Horn's does, and do not believe that *Kmart* conflicts with or undermines our decision in this case.

The carrier in *Kmart* (Riss International Corp.) filed with the Interstate Commerce Commission a so-called mileage (or distance) tariff, specifying rates per mile of carriage. For the distance component of the tariff, the carrier relied upon a Mileage Guide published by a Household Goods Carriers' Bureau (Bureau). The Mileage Guide referred shippers to a separate Bureau tariff filed with the Commission, which listed the "participants" in the Mileage Guide. The Guide stated that a carrier cannot use it unless the carrier was shown as a "participant" in the Guide. Riss had been a participant, but prior to the transportation involved in the case, its participation had been cancelled for failure to file a proper power of attorney and pay the normal participation fee to the Bureau.

Riss transported goods for Kmart at negotiated rates that were below those provided in the filed tariffs. After Riss filed a bankruptcy petition, its successor (Security Services) attempted to collect from Kmart the difference

between the negotiated rates and the rates specified in the tariff, for which it contended Kmart was liable under the filed-rate doctrine.

The Commission has a "void-for-nonparticipation" regulation, under which a tariff is "void" for a carrier that is not a participant therein. The Supreme Court upheld the court of appeals ruling that the filed-rate doctrine did not entitle Security Services to collect the alleged undercharges from Kmart because there was no valid tariff rate on file with the Commission since "in effect [the carrier] had no rates on file because its tariff lacked an essential element" (114 S. Ct. at 1708), namely, a mileage tariff in which the carrier was a participant. Under the Commission regulation, the mileage guide tariff of the Bureau was "void" with respect to Riss because of the latter's failure to continue is participation therein. The Court rejected various challenges to the Commission's void-for-nonparticipation regulation.

In the concluding paragraph of the opinion, the Court summarized its holding as follows:

> When a carrier relies on a mileage guide filed by another carrier or agent, under ICC regulations the carrier must participate in the guide by maintaining a power of attorney; when a carrier fails to maintain its power of attorney and its participation is canceled by its former agent's filing of an appropriate tariff, the carrier's tariff is void. Trustees in bankruptcy and debtors in possession may rely on the filed rate doctrine to collect for undercharges, *Maislin Industries, U. S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S. Ct. 2759, 111 L.Ed. 2d 94 (1990), but they may

> not collect for undercharges based on filed, but void, rates.

Id. at 1710.

The filed-rate doctrine was inapplicable in *Kmart* because under the Commission's void-for-noncompliance regulation, the tariff rates the carrier had filed were void, so that there was no filed rate in effect. The Court began its opinion by stating the question in terms of "undercharges based on tariff rates that are void as a matter of law under the Interstate Commerce Commission's regulations." *Id.* at 1704. The Court stated that it granted *certiorari* "to resolve a Circuit conflict over the validity of the ICC void-for-nonparticipation regulation." *Id.* at 1706. The Commission's regulation and the carrier's failure to comply with it thus was the touchstone of the Court's decision.

In the present case, in contrast, there is no Commission regulation providing that a tariff is void when the carrier fails to comply with a Commission order telling the carrier to amend its tariffs to reflect is change in name, and the Commission takes no action to enforce its direction. Such non-action sharply contrasts with the four enforcement proceedings the Commission instituted to compel the carrier to comply with the Commission's directive to amend its insurance coverage, which the carrier did.

Horn's points to Commission regulations stating that "[w]hen a carrier's name is lawfully changed . . . tariff adjustments must be made," that "(1) Adoption notices shall be filed to reflect new ownership or control when – (i) a carrier's name is lawfully changed," and that "(2) In

addition to the adoption notice, an adoption supplement shall be filed to reflect the new carrier's adoption of the old carrier's tariff(s)." 49 CFR § 1312.20(a)(2), (b)(1)(i), (b)(2). Unlike the regulation involved in *Kmart*, however, these regulations do not make the previously filed tariffs void for failure to amend them to reflect the changed name. As we noted in our prior opinion, "[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent" (*quoting, United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990)). 23 F.3d at 1154.

Horn's argues that because the tariff upon which Norwest relied "is not properly published in its name it cannot rely upon that tariff to support a claim for undercharges." [Pet. Rehear. page 12] In view of the narrow holding in *Kmart*, explicitly tied to the Commission's "void-for-nonparticipation" regulation, we see nothing in *Kmart* that induces us to change our decision in this case.

Horn's other contentions in support of its petition for rehearing do not require discussion.

No judge in active service has requested a vote on the suggestion for rehearing en banc and all of the judges on the original panel have voted to deny a rehearing.

The petition for rehearing is DENIED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX D

49 U.S.C. § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classification, rules, and practices related to those rates, and (B) if a contract carrier, rules, and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has

provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. . . .

49 U.S.C. § 10922. Certificates of motor and water common carriers

(b)(1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds –

> **(A)** that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and
>
> **(B)** on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve as useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

49 U.S.C. § 10926. Transfers of certificates and permits

Except as provided in this subtitle, a certificate or permit issued under section 10922 or 10923 of this title –

> **(1)** if a certificate or permit of a motor carrier, may be transferred under regulations of the Interstate Commerce Commission

49 U.S.C. § 10927. Security of motor carriers, brokers, and freight forwarders

(a)(1) The Commission may issue a certificate under section 10922 or 10530 or a permit under 10923 only if the carrier (including a motor private carrier and a foreign motor private carrier) applying for such certificate files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, section 30 of the Motor Carrier Act of 1980, section 18 of the Bus Regulatory Act of 1982, and the laws of the State or States in which the carrier is operating, to the extent applicable. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit, or for loss or damage to property (except property referred to in paragraph (3) of this subsection),

or both. A certificate or permit remains in effect only as long as the carrier satisfied the requirements of this paragraph.

49 CFR Ch. X

§ 1312.20 Transfer of operations – change in name and control.

(a) *General.* (1) As used in this section –

(i) *Old carrier* refers to the carrier or party whose name is changed or whose operating authority is transferred;

(ii) *New carrier* refers to the new name of the old carrier or to the party to which the operating authority is transferred; and

(iii) *Adoption publications* refers to adoption notices, and combination adoption notices and adoption supplements.

(2) When a carrier's name is lawfully changed or its operating authority transferred, tariff adjustments must be made. The procedure to be followed depends on the particular circumstances.

(b) *Purpose of Adoption notices.* (1) Adoption notices shall be filed to reflect new ownership or control when –

(i) A carrier's name is lawfully changed;

(ii) A carrier's operating authority is transferred, entirely or partially; or

(iii) A fiduciary (receiver, trustee, etc.) assumes possession and control of a carrier's property; and when the

carrier wishes (for whatever period) to use the old carrier's tariffs.

(2) In addition to the adoption notice, an adoption supplement shall be filed to reflect the new carrier's adoption of the old carrier's tariff(s).

(c) *When adoption notice only is required.* The new carrier shall file an adoption notice, in its own name and in tariff form, if the old carrier has no effective tariffs of its own (or predecessor's) issue to be adopted, but does have rates or other provisions in an agent's or another carrier's tariff(s) to be adopted.

Supreme Court, U.S.
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No. 94-1210

In The

Supreme Court of the United States

October Term, 1994

HORN'S POULTRY, INC.,

Petitioner,

v.

NORWEST TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a motor common carrier's failure to adopt tariffs subsequent to changing its name renders those tariffs inapplicable when the Interstate Commerce Commission has approved the change of name, and has not suspended or set aside such tariffs?

PARTIES TO THE PROCEEDING

Appellee in the United States Court of Appeals for the Seventh Circuit and Respondent herein is Norwest Transportation, Inc. ("Norwest" or "Respondent"), a motor common carrier regulated by the Interstate Commerce Commission.

Appellant in the United States Court of Appeals for the Seventh Circuit and Petitioner herein is Horn's Poultry, Inc. ("Horn's" or "Petitioner"), a shipper in interstate commerce.*

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* Respondent is unaware of any parent or subsidiary companies for the corporations that are parties to this proceeding.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REASONS WHY WRIT SHOULD BE DENIED 1

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT RUN AFOUL OF THIS COURT'S *KMART* DECISION 1

II. UNLIKE THE REGULATIONS IN *KMART* THE ICC REGULATIONS GOVERNING ADOPTION OF TARIFFS DO NOT PROVIDE A PENALTY FOR NONCOMPLIANCE 5

III. THE 1994 AMENDMENT TO 49 C.F.R. § 1312.20 EVIDENCES A LACK OF A TIMING ELEMENT IN THE REGULATION APPLICABLE HERE 7

IV. THE SEVENTH CIRCUIT ADDRESSED *KMART'S* APPLICABILITY IN ITS DECISION DENYING HORN'S PETITION FOR REHEARING 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Berwind-White Coal Mining Co. v. Chicago & E.R., 235 U.S. 371 (1914) 4

Davis v. Portland Seed Co., 264 U.S. 403 (1924) 4

Genstar Chem Ltd. v. Interstate Commerce Comm'n, 665 F.2d 1304 (D.C.Cir. 1981) 4

Horn's Poultry, Inc. v. Norwest Transportation, Inc., 23 F.3d 1151, *reh'g denied*, 37 F.3d 1237, 1994 WL 554655 (7th Cir. 1994) ..... *passim*

Security Services, Inc. v. Kmart Corporation, 511 U.S. ___, 128 L.Ed.2d 433 (1994) ..... *passim*

United States v. James Daniel Good Real Property, 62 U.S.L.W. 4013 (U.S. Dec. 13, 1993) 2

United States v. Montaluo-Murillo, 495 U.S. 711 (1990) 2

REGULATIONS

49 C.F.R. § 1312.4(d) 1, 6

49 C.F.R. § 1312.10(a) 6

49 C.F.R. § 1312.20 1

49 C.F.R. 1312.20(h) 7

49 C.F.R. § 1312.30 6

REASONS WHY WRIT SHOULD BE DENIED

Horn's Petition seeks reversal based on this Court's decision in *Security Services, Inc. v. Kmart Corporation*, 511 U.S. ___, 128 L.Ed.2d 433 (1994) ("*Kmart*"). Horn's avers that the rationale in *Kmart* is applicable in this matter. Horn's suffers from a fundamental misunderstanding of the issues involved in *Kmart* as applied to this matter. In *Kmart* this Court was presented with an incomplete tariff. The carrier failed to participate in a mileage guide referenced in its tariff, and the void-for-nonparticipation regulations nullified the tariff. *See* 49 C.F.R. § 1312.4(d)(1993) ("[a]bsent effective concurrences or powers of attorney, tariffs are void as a matter of law."). Here, there is no such tariff deficiency, as the Interstate Commerce Commission ("ICC") granted the request of B.J. Xpress to change its name to Norwest. Petitioner relies on a regulation, 49 C.F.R. § 1312.20, that was not at issue in *Kmart*, nor does 49 C.F.R. § 1312.20 provide a remedy, like § 1312.4(d), that voids a tariff if there is noncompliance with the regulation. The decision of the Seventh Circuit followed this Court's precedent and held that an effective tariff not suspended or set aside by the ICC governs the relationship of the parties.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT RUN AFOUL OF THIS COURT'S *KMART* DECISION

The Seventh Circuit found that the carrier's failure to amend its tariff to reflect a name change (as ordered by the ICC in boilerplate language) did not invalidate its tariff, especially in light of the fact that the governing

regulation contained no consequence or punishment for noncompliance. The Seventh Circuit stated:

> In *United States v. James Daniel Good Real Property*, 62 U.S.L.W. 4013 (U.S. Dec. 13, 1993), the Supreme Court held that a government forfeiture action filed within the applicable limitation period but not in compliance with other statutory timing requirements, was not subject to dismissal on the latter ground. The Court stated that it had held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanctions." *Id.* at 4019. The Court quoted the statement in *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990), that '[t]here is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent.'

Horn's Poultry, Inc. v. Norwest Transportation, Inc., 23 F.3d 1151, 1153-54 *reh'g denied*, 37 F.3d 1237, 1994 WL 554655 (7th Cir. 1994) ("Horn's"). The Court of Appeals concluded that Norwest's failure to amend its tariff to present its change of name, and the Commission's conscious "non-action to compel such amendment" did not prevent the enforcement of the tariff in a suit for undercharges. *Horn's*, 23 F.3d at 1154.

The carrier changed its name from B.J. Xpress, Inc. to Norwest Transportation, Inc. in 1987. The ICC in approving the change directed Norwest to amend its insurance filing, designation of agents for service of process and tariffs to reflect the name change. Norwest never amended its tariffs. The Court of Appeals was thus presented with the question

of "whether a filed tariff is valid where the motor carrier has failed to amend the name on the tariff after a change in ownership, but the ICC has not taken any action to suspend or revoke the tariff." *Horn's*, 23 F.3d at 1152. The Court of Appeals' opinion adopted the district court holding that "[u]nless and until suspended or set aside by the Commission, the tariff is the legal rate between the shipper and the carrier for all purposes, . . . since Norwest/B.J. Xpress' tariff had not been suspended or set aside by the ICC, it was the legal rate which Horn's is obligated to pay." *Horn's*, 23 F.3d at 1153.

Affirming the district court, the Seventh Circuit noted that it is clearly within the powers of the ICC to suspend or revoke a carrier's tariff when the carrier fails to comply with a Commission order to amend the tariff to reflect the carrier's new name. Most importantly the Commission had taken no action to suspend or set aside the tariff. The Seventh Circuit noted:

> Although that tariff had been filed by B.J. Xpress and not by Norwest, the latter was merely the new name under which the former carrier operated after the Commission had authorized the name change. Norwest, therefore, was entitled to recover from Horn's the amount necessary to bring the charge into conformity with the tariff on file with the Commission.
>
> There is *no convincing reason* why a deviation from the filed rate should be sanctioned simply because Norwest failed to comply with the Commission's order to amend its tariff to show its new name.

Horn's, 23 F.3d at 1153 (emphasis added).

The lack of administrative action taken with respect to Norwest's failure to file an adoption notice was highlighted by the ICC's intervention when Norwest failed to amend its insurance coverage. The Court of Appeals observed:

> Indeed, such administrative action was the course the Commission followed when Norwest failed to amend its insurance coverage to reflect its new name. The Commission instituted four separate proceedings to revoke Norwest's operating authority for this deficiency, which it dismissed after Norwest submitted the requisite evidence of insurance.

Horn's, 23 F.3d at 1153. There is simply no reason to allow the shipper to evade the application of the filed tariff rate simply because Norwest "failed to comply" with the Commission's order to amend its tariff. The agency must have been aware of the technical "blemish" and to have acquiesced in its continuance. *See Kmart*, 128 L.Ed.2d at 444; discussion *infra* at p.6.

This Court recognized long ago that a tariff on file with the Commission and never rejected or revoked is binding despite any irregularity in the formalities of tariff filing. *Berwind-White Coal Mining Co. v. Chicago & E.R.*, 235 U.S. 371 (1914). Even "substantive unlawfulness" of the rate will not invalidate a tariff which has been filed and never revoked. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924), *see also, Genstar Chem. Ltd. v. Interstate Commerce Comm'n*, 665 F.2d 1304, 1308 (D.C. Cir. 1981). That Norwest never adopted the tariffs of its predecessor does not mean that there is no tariff on file. Norwest and its customers referred to the tariffs and Norwest rated

shipments according to those tariffs. At best, the tariff was technically deficient in that Norwest had not properly adopted the tariff. More importantly, the ICC has never revoked, set aside or canceled B.J. Xpress' tariffs even though it has taken enforcement steps for other deficiencies. Thus, the tariff remains on file with the Commission and its terms bind the carrier and shipper for the shipments in question.

II. UNLIKE THE REGULATIONS IN *KMART* THE ICC REGULATIONS GOVERNING ADOPTION OF TARIFFS DO NOT PROVIDE A PENALTY FOR NONCOMPLIANCE

The Commission's regulations regarding the adoption of tariffs subsequent to a change in name do not provide a penalty for failure to comply. The regulations certainly do not provide for voiding of the tariff as a result of a failure to adopt the tariff, and there is no evidence or allegation that the agency had ever taken such an action. The Commission regulation merely provided that adoption should be done "promptly".

In *Kmart* the majority opinion crisply and succinctly held:

> Here, petitioner's tariff reference to the HGCB Mileage Guide became void as a matter of law and its tariff filings incomplete on their face on February 19, 1985, when HGCB canceled its participation in the Mileage Guide by filing a supplemental tariff. The transactions with Kmart occurred after that date.

Kmart, 128 L.Ed.2d at 443. As previously stated, the *Kmart* decision found the carrier's tariff rate to be incomplete, as an integral part of the computation of the rate mileage was not present to calculate the appropriate charge.

The *Kmart* decision also distinguished the "technical defect" cases, like the one now before the Court, from its holding. Justice Souter, writing for the majority, stated:

> Unlike the shippers in the "technical defect" cases, the shipper here could not determine the carrier's rates, since under the regulations, distance tariffs are incomplete once the carrier's participation in the Mileage Guide has been canceled by the agent's filing. See 49 CFR §§ 1312.4(d); 1312.10(a); 1312.30 (1993). We are dealing not with a complete tariff subject to some blemish independently remediable, but with an incomplete tariff insufficient to support a reliable calculation of charges.

Kmart, 128 L.Ed.2d at 444. Horn's would nullify Norwest's tariff because of a minor, technical deficiency that does not mislead the shipping public. There is *no* confusion about the rates that apply under the tariff as published.

III. THE 1994 AMENDMENT TO 49 C.F.R. § 1312.20 EVIDENCES A LACK OF A TIMING ELEMENT IN THE REGULATION APPLICABLE HERE

The regulation relied upon in this matter, states:

> (h) *Effective date of adoption publications.*
>
> (1) The effective date of adoption publications is the date the adoption occurs. Adoption publications shall be filed *promptly* and, if possible, prior to the effective date of the publication.

49 C.F.R. § 1312.20(h) (emphasis supplied)

The regulation as amended in 1994, states:

> (h) *Effective date of adoption publications.*
>
> (1) The effective date of adoption publications is the date of consummation of the transaction for which such publications are required. Adoption publications shall be filed promptly and, if possible, prior to their effective date, *but in no case later than 60 days thereafter.*

49 C.F.R. § 1312.20(h) (emphasis supplied)

The regulations *now* allow for a 60 day window within which to file appropriate adoption notices. This was not the case when the transaction between B. J. Xpress and Norwest took place as there was no such referenced time frame. Still the 1994 amended regulation does not provide a self-enforcing remedy for a failure to file adoption notices.

IV. THE SEVENTH CIRCUIT ADDRESSED *KMART'S* APPLICABILITY IN ITS DECISION DENYING HORN'S PETITION FOR REHEARING

Petitioner raised the identical issue before the Seventh Circuit in a Petition for Rehearing and Suggestion for Rehearing En Banc based on this Court's decision in *Kmart*. The Seventh Circuit found that this Court in *Kmart* reasoned that:

> The filed-rate doctrine was inapplicable in *Kmart* because under the Commission's void-for-noncompliance regulation, the tariff rates the carrier had filed were void, so that there was no filed rate in effect.

37 F.3d at ___, 1994 WL 554655 at *2.

The Seventh Circuit contrasted *Kmart* with the factual circumstances in this matter and stated:

> In the present case, in contrast, there is no Commission regulation providing that a tariff is void when the carrier fails to comply with a Commission order telling the carrier to amend its tariffs to reflect its change in name, and the Commission takes no action to enforce its direction. Such non-action sharply contrasts with the four enforcement proceedings the Commission instituted to compel the carrier to comply with the Commission's directive to amend its insurance coverage, which the carrier did.

37 F.3d at ___, 1994 WL 554655 at *2.

The Seventh Circuit correctly reasoned that the holding in *Kmart* "explicitly tied to the Commission's 'void-for-non-participation' regulation" supplied no grounds for reversal of its earlier decision. 37 F.3d at ___, 1994 WL 554655 at *2.

CONCLUSION

Because the Panel opinion is correct and the Supreme Court decision in *K-Mart* inapplicable, the Petition for Writ of Certiorari should be denied.

Dated: February 7, 1995.

Respectfully submitted,

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